Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLIAM E. YOUNG, SR.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in federal criminal cases the constitutional principles underlying *Apprendi v. New Jersey*, 530 U.S. 466, apply to sentencing enhancements imposed by the trial judge pursuant to the U.S. Sentencing Guidelines for matters for which there has been no indictment and no jury determination beyond a reasonable doubt, when the enhancements do not increase the sentence above the statutory maximum.

2. Whether in federal criminal cases, the *Apprendi* principles apply to sentencing enhancements which, even though they do not increase the sentence above the statutory maximum, are enhancements for matters which involve separate criminal offenses for which there has been no indictment by a grand jury and no determination by a jury beyond a reasonable doubt but instead only a determination solely by the trial judge pursuant to the U.S. Sentencing Guidelines.

3. Whether in federal criminal cases, even if the *Apprendi* principles were to apply only when the statutory maximum is exceeded, nevertheless for *Apprendi* purposes the top of the sentencing range under the U.S. Sentencing Guidelines for the Base Level Offense is to be deemed the statutory maximum.

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IN THE

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No. ___

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit with respect to a matter important to proper administration of criminal justice throughout the federal courts on a nationwide basis—as well as important to petitioner who, it is submitted, is serving a constitutionally flawed excessive sentence.

OPINIONS AND ORDERS BELOW

The Second Circuit's order denying rehearing (p. A-1 below) is unreported. Its order affirming the dismissal of petitioner's § 2255 petition (p. A-2 below) is unreported. The District Court's certificate of appealability on the § 2255 petition (p. A-5 below) is unreported. The District Court's

dismissal for want of merit of petitioner's § 2255 petition (p. A-6 below) is unreported. The Second Circuit's prior affirmance of petitioner's conviction and sentence on direct appeal (p. A-15 below) is unreported but is listed at 213 F.3d 627. The District Court's oral opinion on sentence (p. A-27 below) and the sentence judgment (p. A-26 below) are unreported.

JURISDICTION

The Second Circuit's order (p. A-2 below) affirming the District Court's dismissal of petitioner's § 2255 petition was issued on August 13, 2002. Petitioner's timely petition for rehearing/rehearing en banc was denied by the Second Circuit on November 5, 2002 (p. A-1 below). Jurisdiction exists pursuant to this Court's Rule 13.1 and Rule 13.3.

CONSTITUTIONAL, STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

Being somewhat lengthy, the various provisions involved in the case are set out in Appendix B (beginning at p. B-1 below). They are:

1. Constitution: Fifth Amendment and Sixth Amendment (p. B-1 below).

2. Criminal Code provisions: 18 U.S.C. § 1201(a)(1) (kidnapping) (p. B-2 below); 18 U.S.C.§ 1512 (obstruction of justice) (p. B-2 below); 18 U.S.C. § 924(c)(1)(A) (firearms use) (p. B-3 below); 18 U.S.C. § 913 (impersonator making arrest or search) (p. B-3 below).

3. Sentencing Guidelines (1998 edition) provisions: USSG § 2A4.1(a) (p. B-3 below); § 3C1.1 (p. B-4 below); § 2A4.1(b)(3) (p. B-3 below); and § 3B1.3 (p. B-4 below).

STATEMENT

In November 1998, a federal grand jury in the Southern District of New York indicted petitioner on four counts. Count One, on which the jury convicted petitioner, charged kidnapping of an adult male in violation of 18 U.S.C. § 1201(a)(1). Count Two, on which the jury acquitted, charged use and carrying of a particular specified firearm during the kidnapping in violation of 18 U.S.C. § 924(c). Counts Three and Four were dismissed before trial. Details of the highly bizarre criminal offense are summarized in the Court of Appeals opinion affirming the conviction on direct appeal (see p. A-15 below) and in the District Court's memorandum and order on the § 2255 petition (see p. A-6 below).

Under the 1998 Sentencing Guidelines, the Base Offense Level for kidnapping—the charge on which petitioner was convicted—was 24. *See* USSG § 2A4.1(a) (1998). With petitioner's absence of prior criminal history this would have produced a sentencing range of 51 to 63 months. However, the District Court, utilizing various provisions of the Sentencing Guidelines, added three upward adjustments based not on jury findings beyond a reasonable doubt but on the judge's own findings (p. A-27 below):

1. a two-level increase, upon the judge's finding that petitioner had committed obstruction of justice, see USSG § 3C1.1 (1998) under the Adjustments portion of the Sentencing Guidelines;

2. a two-level increase for the use of a firearm, see USSG § 2A4.1(b)(3) (1998) under the Specific Offense Characteristics of the Sentencing Guidelines' instructions relating to kidnapping—although the jury had acquitted on the charge that petitioner had used a particular specified firearm;

3. a two-level increase for the use of "special skills" in the kidnapping, see USSG § 3B1.3 (1998) under the Adjustments portion of the Sentencing Guidelines, in that petitioner, a retired police officer, used "a police hat and police badge" and borrowed on "his experience in making many prior arrests" in furtherance of the abduction.

The three upward adjustments led to an Adjusted Offense Level of 30, yielding a sentencing range of 97 to 121 months, substantially doubling the proper sentence for the kidnapping offense on which the jury had convicted petitioner. With these judge-determined enhancements, the Court imposed a sentence of 120 months, which petitioner is currently serving.

Petitioner's direct appeal raised issues concerning the exclusion of evidence, an asserted constructive amendment of the indictment, and the merits under the Guidelines of the sentencing determinations. On May 25, 2000, the Second Circuit affirmed (p. A-15 below).

The next month, on June 26, 2000, this Court issued its landmark decision in *Apprendi v. New Jersey,* 530 U.S. 466.[1]

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[1] There seems to be general agreement that *Apprendi* was a landmark decision. And in her *Apprendi* dissenting opinion on behalf of herself and three other Justices, Justice O'Connor, in acknowledging the sweep of the Court's decision, wrote "the apparent effect of the Court's opinion today is to halt the current debate on sentencing reform in its tracks and to invalidate with the stroke of a pen three decades' worth of nationwide reform, all in the name of a principle with a questionable constitutional pedigree." 530 U.S. at 550. Recently, in assessing the legacy of *Apprendi*, the Harvard Law Review said "Two years ago, the United States Supreme Court created an upheaval in criminal law by ruling, in *Apprendi v. New Jersey*, that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.'" "The Supreme Court, 2001 Term: Leading Cases," 110 Harvard Law Review 200, 230 (November 2002).

On May 23, 2001 (which was less than a year after the May 25, 2000, affirmance of the conviction on direct appeal and hence clearly within the one-year period expressly authorized by 28 U.S.C. § 2255), petitioner filed a petition under 28 U.S.C. § 2255 challenging the constitutionality, under *Apprendi*'s principles, of the enhancement portions of his sentence. The District Court in an extensive memorandum and order dismissed the § 2255 petition for want of merit, rejecting petitioner's contention that the enhancements, resting on findings of other criminal offenses that were never subjects of the indictment or of a jury verdict, violated the *Apprendi* constitutional principles (p. A-6 below). On August 16, 2001, the District Court granted a certificate of appealability, stating that a certificate was warranted because the issue presented by petitioner's § 2255 petition was one on which "there is sufficient bases for reasonable differences of opinion" (p. A-5 below).

On petitioner's timely appeal, the Second Circuit ultimately issued an order on August 13, 2002, summarily affirming on the merits the District Court's dismissal of the § 2255 petition (p. A-2 below). Petitioner's timely petition for rehearing/rehearing en banc, filed on August 23, 2002, was denied on November 5, 2002 (p. A-1 below). This petition for certiorari follows.

REASONS FOR GRANTING THE WRIT

1. As is evident from this Court's docket over the past two terms, *Apprendi* precipitated many significant constitutional questions not resolved by the text of *Apprendi* itself. Some of these are questions fundamental to the federal criminal justice system's lawful operation in accordance with the Sixth Amendment's constitutional requirements, and hence also test the Fifth Amendment's fabric of grand jury participation and of due process of law. They are likewise questions which arise repetitively in the federal courts. And they are

questions, now ripe for early decision, to which only this Court can provide the answers. Petitioner's case falls clearly within these categories and is worthy of review by this Court.

2. One ground on which petitioner's sentence should be reviewed for unconstitutional excessiveness turns on a question which was not reached by the Court's opinion in *Apprendi*. That opinion held that, apart from the fact of a prior conviction, any facts that increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In order to come to the conclusion reached in *Apprendi*, there was no need to go beyond this, and to decide whether a critical element which would increase the penalty to a point less than the statutory maximum must also—at the very least, in appropriate cases—be submitted to a jury and be proved beyond a reasonable doubt. Justice Thomas' concurring opinion in *Apprendi* would have gone further, in a direction which would sustain petitioner's position here; he joined the Court's opinion "in full" but wrote separately "to explain my view that the Constitution requires a broader view than the Court adopts" (530 U.S. at 499).

It is recognized, however, that the various courts of appeals in the federal circuits have accepted the Justice Department's contention that *Apprendi*'s principles do not apply unless the sentence goes beyond the statutory maximum. Hence, the possibility of further litigation creating a conflict of circuits in this recurring matter seems especially remote. It is this Court alone that can authoritatively answer this question, which arises in what appears to be at least many hundreds, and perhaps thousands, of federal criminal cases each year.

The Court's decisions toward the end of last term do not yet define the full scope of *Apprendi* principles. *Harris v. United States*, 536 U.S. ____, 122 S. Ct. 2406, decided June 24, 2002, turned essentially on the distinct interpretation which the Court gave to the inclusion of "brandishing" in the

applicable statute, 18 U.S.C. § 924(c)(I)(A). Justice Thomas' dissenting opinion for four members of the Court takes *Apprendi* the distance which clearly includes cases like petitioner's. The decisive Part III of the *Harris* plurality opinion lacked the support of the fifth Justice (Justice Breyer), who, concurring on other grounds, said "I cannot easily distinguish *Apprendi v. New Jersey* from this case in terms of logic. For that reason, I cannot agree with the plurality's opinion insofar as it finds such a distinction" (122 S. Ct. at 2420). Moreover, the case was one where the defendant had expressly waived a jury trial (122 S. Ct. at 2411 and 2422), so that the judge was the sole fact-finder, even though it was being argued that the judge had used the wrong standard of proof.

In the contemporaneous *Ring v. Arizona*, 536 U.S. ____, 122 S. Ct. 2428, also decided June 24, 2002, it should be noted that, as stated in Justice Kennedy's concurring observations, "*Apprendi* is now the law and its holding must be implemented in a principled way" (122 S. Ct. at 2445). And as the Court's opinion says (122 S. Ct. at 2443):

> "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact finding necessary to increase a defendant's sentence by two years, but not the fact finding necessary to put him to death. We hold that the Sixth Amendment applies to both."

By any standard, petitioner's case presents an ideal vehicle for the authoritative clarification of *Apprendi*'s reach—a clarification which is badly needed before thousands of new cases are brought which follow a course that later might be held unconstitutional.

3. Even if *Apprendi* were to be limited to cases where the sentence imposed exceeded the "statutory maximum," there would be the question whether, within the meaning of the

Apprendi principles, the upper limit for the range for the Base Offense Level under the Guidelines should be deemed the "statutory maximum." In this case, the Second Circuit, relying on its decision in *United States v. Norris*, 281 F.3d 357, 361 (2002), held to the contrary (p. A-3 below). But the question has not yet been ruled on, or even expressly discussed, by this Court. It raises another perspective on whether, under *Apprendi*'s principles, the enhancements in the Guidelines will at times run counter to the constitutional protections which *Apprendi* exemplifies.

4. In any event, however, petitioner's case is in a category far more compelling for the defendant than was *Harris*. Here the three enhancements found by the judge without any jury support—enhancements which had the effect of substantially doubling petitioner's sentence—were for facts not part of the kidnapping statute, 18 U.S.C. § 1201(a)(1), but instead were separate federal crimes on which the prosecution had not thought it necessary to obtain an indictment and on which neither the prosecution nor the judge had the benefit of a finding by the jury beyond a reasonable doubt.

Thus with respect to the two-level sentence enhancement for obstruction of justice, the federal crime of obstruction of justice has been on the statute books in varying forms at least since Section 2 of the Act of March 2, 1831, 4 Stat. 488. Its modern manifestation is to be found in Title 18, Chapter 73, entitled "Obstruction of Justice" and there primarily in 18 U.S.C. § 1512(b), set forth in part at page B-2 below. Obstruction of justice is a crime of great breadth.[2] It has

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[2] *See, e.g., United States v. Russell*, 255 U.S. 138 (1921); *Osborn v. United States*, 385 U.S. 323 (1966); and the numerous Court of Appeals affirmances of convictions for obstruction of justice, as cited in the annotations to 18 U.S.C.A. § 1512. This Court has held that under the Sentencing Guidelines a two-level enhancement for obstructing justice may be imposed by the sentencing judge if the judge personally determines that the defendant committed perjury while testifying on his

recently become a household phrase by virtue of the federal conviction of Arthur Andersen & Co. after a highly-publicized trial in Houston. If, as in this case, the prosecution were to be empowered not to bring an indictment and the judge were to be empowered to impose sentence without a jury verdict beyond a reasonable doubt on the issue, the Constitution would be standing on its head. The strong purpose of the Bill of Rights to impose safeguards against excessive governmental powers in criminal prosecutions would be severely thwarted. Moreover, there are many grounds on which, if the obstruction of justice issue had been placed before the jury, the jury might have declined to find petitioner guilty on this matter beyond a reasonable doubt. It is our submission that the procedure followed in this case—as indeed in many other cases—cannot be squared with the Constitution.

The situation is similar with respect to the two-level enhancement which the judge imposed for use of a firearm. This, too, is a separate federal crime under the Criminal Code at 18 U.S.C. § 924(c), which is set forth at page B-3 below.[3] And likewise, the situation is similar with respect to the two-level enhancement which the judge imposed for what was essentially impersonating a police officer. This is a separate

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own behalf during the trial. *United States v. Dunnigan*, 507 U.S. 87 (1993). This was seven years before *Apprendi* and in due course may be subject to reassessment in the light of *Apprendi*.

[3] As already stated (p. 3 above), Count Two of the indictment charged petitioner with use and carrying of a particular specified firearm during the kidnapping in violation of 18 U.S.C. 924 (c) and the jury acquitted petitioner on this count. The district judge thought this was because there was a conflict of testimony as to which of two firearms petitioner was carrying and the jury "motivated perhaps by a desire to be cautious and fair," had acquitted petitioner on the charge of using the gun specified in Count Two (*see* p. A-30 below) and this two-level enhancement was nevertheless imposed by the judge.

federal crime under the Criminal Code at 18 U.S.C. § 913, which is set forth at page B-3 below.

All three enhancements are the product of a system which, we submit, ignores the pertinent constitutional limitations. It is not merely this case or a handful of cases. The federal prosecutors and the federal district judges have been systematically proceeding under a *modus operandi* which totally bypasses the requirements of the Sixth and Fifth Amendments as reflected in the principles which *Apprendi* has articulated. The fact that such an unconstitutional system has been permitted to flourish for a substantial period of time underscores the need for this Court to intervene.

In sustaining the general constitutionality of the Sentencing Reform Act, 18 U.S.C. § 3551 et seq., and of the Sentencing Guidelines, in *Mistretta v. United States*, 488 U.S. 361 (1989), this Court in no way dealt with far different issues of constitutionality that might arise in particular types of cases. Nor did the Court even hint at foreclosing the strong possibility that application of certain Sentencing Guidelines to particular types of cases might—as here, because of *Apprendi*'s principles—be unconstitutional.

The reality that the system reflected in this record has been operating for nearly two decades cannot immunize the system or justify its departures from what the Constitution demands. In decapitating *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842), this Court held in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938), that "the unconstitutionality of the course pursued" is to be abandoned even when it has persisted over a long period of time. The present situation should be reviewed in order to assure that an unconstitutional course of conduct does not continue to plague the criminal justice system being administered in the federal courts.

CONCLUSION

For the various reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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January 2003

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed Nov. 5, 2002]

Dkt. No.: 01-2518

YOUNG,
Petitioner-Appellant,

v.

USA,
Respondent-Appellee.

[DENIAL OF REHEARING]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5th day of November two thousand two.

A petition for Rehearing and a petition for rehearing en banc having been filed herein by the appellant William E . Young, Sr.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en bane has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/ Arthur M. Heller
ARTHUR M. HELLER
Administrative Attorney

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed Aug 13, 2002]

No. 01-2518(L)
No. 01-2522(CON)

WILLIAM E. YOUNG, SR,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent Appellee.

[AFFIRMANCE]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of Aug., two thousand one.*

PRESENT:

HON. RALPH K. WINTER,
HON. SONIA SOTOMAYOR,
Circuit Judges,
HON. JOHN G. KOELTL
*District Judge.***

Movant William E. Young, Sr., convicted after a jury trial of one count of kidnapping, in violation of 18 U.S.C. § 1201(a)(1), and acquitted of one count of carrying a firearm in the commission of the crime, in violation of 18 U.S.C.

[* Note: "one" is clearly error for "two." The Clerk's file date stamp (above) reads "Aug 13 2002".]

** The Honorable John G. Koeltl, United States District Court for the Southern District of New York, sitting by designation.

§ 924(c), appeals from the denial of his motion for post-conviction relief pursuant to 28 U.S.C. § 2255. At sentencing, the district court calculated movant's Base Offense Level as 24, with a Criminal History Category of I, which would have resulted in a sentencing range of 51 to 63 months. *See* U.S.S.G. § 2A4.1. The district court added three upward enhancements for obstruction of justice, use of a firearm, and use of "special skills" obtained during his employment as a police officer. Movant's adjusted offense level was 30, resulting in a sentencing range of 97 to 121 months. Movant was then sentenced to 120 months imprisonment. In his § 225.5 motion, movant argues that the imposition of a sentence that exceeded the upper limits of the Sentencing Guidelines range prior to the imposition of the enhancements violated the constitutional rule set forth in *Apprendi v. New Jersey, 530 U.S. 466 (2000).* The government has moved for summary affirmance of the district courts denial of the § 2255 motion.

UPON DUE CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the government's motion for summary aff rmance of the district court's denial of the § 2255 motion is granted.

Movant argues that a sentence exceeding the upper limit of a Guideline ranges goes beyond the prescribed "statutory maximum" within the meaning of *Apprendi.* Although we have held that such an argument is not "frivolous," it is foreclosed by our recent decision in *United States v. Norris*, 281 F.3d 357, 361 (2d Cir. 2002) ("[T]o whatever extent the Commission's Guidelines ranges might be considered to be 'statutory maximums,' we do not believe those ranges are statutory maximums for purposes of applying the constitutional requirements announced by . . . *Apprendi.*").

We have considered movant's remaining arguments, and find them to be either moot or without merit. The district court's denial of movant's § 2255 motion is affirmed.

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr
LUCILLE CARR, Deputy Clerk

GRANT OF CERTIFICATE OF APPEALABILITY, AUGUST 16, 2001

The within application is granted. Without intending to express doubt with respect to this Court's resolution of the issue, there is sufficient bases for reasonable differences of opinion and a Certificate of Appealability should be and hereby is issued in the case.

SO ORDERED

August 16, 2001 Charles Brieant, USDJ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed July 20, 2001]

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01 Civ. 4367 (CLB)
98 Cr. 1195 (CLB)

WILLIAM E. YOUNG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM & ORDER

Brieant, J.

By counseled Petition filed on May 22, 2001 pursuant to 28 U.S.C. § 2255, Petitioner William E. Young seeks to vacate and correct the federal sentence he is currently serving for a kidnaping conviction under a Judgment filed November 18, 1999, on the ground that the sentence was enhanced as a result of Constitutionally impermissible adjustments to the Sentencing Guidelines computation, based on Petitioner's total offense behavior which included federal and other crimes never alleged in an indictment or *found* beyond a reasonable doubt by a jury. The claim is not that the Court did not apply the Sentencing Guidelines as provided, but rather that they are unconstitutional as applied.

The factual background of the conviction is as follows. In 1994, Petitioner retires from a 31-year career as a police officer and began trading as a part-time dealer and broker of merchandise. Petitioner made a deal with Mr. Henry Hall (the

victim of the kidnaping) to buy from Mr. Hall for resale 18,000 dozen t-shirts. Petitioner paid some $2,100 to Hall for shipping costs, but the goods were never delivered. New Jersey officials accepted a criminal complaint which they reduced to a misdemeanor, as a result of which extradition was unavailable, although Hall could be arrested if found in New Jersey. Subsequently, Petitioner was told by Cynthia Jarnagin, Mr. Hall's girlfriend, that she and Mr. Hall would be at the Hampton Inn in Elmsford, New York, in this district, on May 24, 1998. Petitioner paid Warren Turnipseed to go with him to the Hampton Inn, armed with police hats, a badge, two handguns and a photograph of the victim that was supplied by Ms. Jarnagin.[1] When Mr. Hall emerged from the inn to join Ms. Jarnagin in their rented car, Petitioner and Mr. Turnipseed, masquerading as police, and displaying the guns, seized Mr. Hall and told him he was "under arrest." Petitioner then handcuffed Mr. Hall. Petitioner, accompanied by Mr. Turnipseed, then drove Mr. Hall from New York to an empty warehouse in Newark, New Jersey. The kidnaping occurred Sunday of a three day holiday weekend (Memorial Day). Petitioner gagged Mr. Hall and wrapped electrical wiring and duct tape around him from head to foot and tied him to a fork lift in the warehouse, leaving only his nose uncovered. He and Mr. Turnipseed left the warehouse and locked the door.

Mr. Hall's screams, after he had loosened the duct tape gag with his saliva, were heard by children who called the police to the scene. Petitioner returned to the warehouse by himself about two hours after he had left, but fled when he saw police there. Petitioner threatened Mr. Turnipseed and warned him not to tell anyone about their activities.

For approximately one week thereafter, Petitioner attempted to conceal what he had done and lied to various

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[1] All of Petitioner's dealings with the victim of the kidnaping had been by mail or telephone.

people about it. Petitioner lied to Ms. Jarnagin about the incident in telephone conversations that Petitioner knew were being taped by the FBI. On June 1, 1998, Petitioner was arrested and continued to tie to the FBI about his actions for a brief period before confessing.

On November 2,1998, a grand jury returned a four count indictment against Petitioner. Count One, for which Petitioner was convicted, charged kidnaping in violation of 18 U. S.C. 120l (a)(1). Count Two, for which Petitioner was acquitted, charged use and carrying of a specific firearm during the kidnaping offense in violation of 18 U.S.C. 924(c).[2] Counts Three and Four were dismissed before trial.

Under the 1998 Sentencing Guidelines, the Base Offense level for kidnaping was 24. With Petitioner's Criminal History Category of I, this base offense level would have produced a sentencing range o f 51 to 63 months. The Court after a hearing, adopted the following three adjustments in addition to the Base Offense Level.

(1) the Court imposed a two-level upward adjustment under Section 3C1.1 of the Sentencing Guidelines upon a finding that Petitioner was guilty of an obstruction of Justice because Petitioner induced his tenant to lie to law enforcement authorities regarding his. whereabouts on the day of the kidnaping. He threatened Mr. Turnipseed and lied to the FBI after his arrest. Our Court of Appeals held on direct appeal *(United Stares v. Young*, 213 F.3d 627, WL 687750, 2d Cir. 2000) that "Young concedes that he asked his

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[2] Count Two charged the use and carrying of a Smith and Wesson Model 64, 38 cal. Revolver, and was supported by the testimony of Mr. Turnipseed. Mr. Young testified that Turnipseed had the S&W revolver, given to him by Young and that Young carried another handgun, an automatic pistol. The jurors acquitted on Count Two after having been instructed by the Court that the Government was required to prove use of the precise weapon charged, before it could obtain a conviction on Count Two.

tenant to tell anybody who asked that he was home that day. Such conduct standing alone is sufficient to support the enhancement. *See* U.S.S.G. § 3C1., comment n.4(a)."

(2) the Court imposed a two-level adjustment upon its finding that Petitioner used a firearm to facilitate the kidnaping. Young admits he did so, but denies he carried the S&W revolver alleged in Count Two. While not discussing this point, our Court of Appeals held on direct appeal that "Having evaluated Young's challenges to the district court's imposition of sentence under U.S.S.C. § 3B1.3 we find each of them to be without merit." *See id.*

(3) the Court imposed a two-level adjustment upon its finding that Petitioner used the "special skills" he had obtained during his thirty-one years as a police officer to commit the offense. Our Court of Appeals also upheld this finding on direct appeal. *See id.*

These enhancements resulted in an adjusted offense level of 30 and a corresponding sentencing range of 97 to 121 months. This court imposed a sentence of 120 months.

Discussion

Petitioner relies *on Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *United States v. Tran, 234* F.3d 798 (2d Cir. 2000), both decided subsequent to the affirmance, to support his Petition. Neither of these cases justifies any relief. In *Apprendi,* the Supreme Court, considering a state conviction, held that any element that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. *See Apprendi,* 530 U.S. at 490 Our Court of Appeals has since held that it

> join[s] the other nine circuits that have ruled on direct review that a guideline factor, unrelated to the sentence above a statutory maximum or to a mandatory statutory

> minimum, may be determined by a sentencing judge and need not be submitted to a jury.

United States v. Garcia, 240 F.3d 180, 184 (2d Cir. 2001)(citing *United States v. Balsas*, 236 F.3d 27, 40-41 (1st Cir. 2001); *United States v. Williams*, 235 F.3d 858, 863-64 (3d Cir. 2000); *United Stares v. Doggett*, 230 F.3d 160,164-65 (5th Cir. 2000); *United States v. Corrado*, 227 F.3d 528, 542 (6th Cir. 2000); *United Stares v. Nance*, 236 F.3d 820, 826 (7th Cir. 2000); *United States v. Aquayo-Delgado*, 220 F.3d 926, 933 (8th Cir. 2000); *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1026-27 (9th Cir. 2000); *United States v. Heckard*, 238 F.3d 1235-36 (10th Cir. 2001); *United States v. Nealy,* 232 F.3d 825, 829 n. 3 (11th Cir. 2000); *United States v. Angle*, 230 F.3d 113,121-24 (4th Cir. 2000), *vacated and ordered to be reheard en banc* (4th Cir. Jan. 17, 2001); *United States v Layeni*, No. 00-3031, 2000 WL 1683476 (D.C. Cir. Oct. 18, 2000) (denying certificate of appealability to review *Apprendi* claim presented on collateral attack because sentence did not exceed statutory maximum)); *see also United States v. White*, 240 F.3d 127, 136 (2d Cir. 2001)("Where, as here, factual determinations were used to sentence the defendant to a sentence within the maximum allowed by statute, *Apprendi* is not controlling, and such determinations can be made by the court without violating the defendant's right to due process."); *United States v. Rivers*, 136 F.Supp.2d 263, No. 00 Civ. 8530, 2001 WL 303759 (S.D.N.Y. Mar. 27, 2001).

In this case, Petitioner was convicted by a jury of kidnaping in violation of 18 U S.C. (A)(7) a crime for which the maximum penalty is life imprisonment. The concerns expressed by the Court in *Apprendi* are not implicated in any way in the instant case. While due process concerns might arise if a Guideline Sentence were to exceed the statutory maximum penalty for the crime of conviction, here, the sentence imposed upon Petitioner for his conviction was far

less than the available statutory maximum.[3] Petitioner's argument conflates the statutory maximum for a crime, with the base offense level before making the adjustments required by Chapter Three of the U.S.S.G. to account for specific offense behavior prescribed for a crime by the Sentencing Commission. This Court sees no basis in law or logic to do so.

United States v. Tran, 234 F.3d 790, relied on by Petitioner, is also inapplicable. In that case defendant Som and an accomplice committed armed robbery of a bank in Florida (the "Florida robbery") and defendants Som and Tran together committed armed robbery of a bank in New York (the "New York robbery"). During the New York robbery, one of the defend ants carried a semiautomatic pistol and the other carried the typical sawed-off, or short-barreled, rifle. *See id* at 803.

Defendant Tran pled guilty to one count of Bank Robbery in violation of 18 U.S.C. § 2113(a)(d) and one count of Using or Carrying, or Aiding and Abetting the Use or Carrying, of Firearms During a Crime of Violence in violation of 18 U.S.C. § 924(c). *See id.* Although the Court found by a preponderance of the evidence that Tran himself was not carrying a short barreled rifle during the commission of the crime, Trap's sentence included a ten-year consecutive sentence for that charge because the Court found that Tran was aware of the use of the short barreled rifle by a confederate during the commission of the crime. *See id.* at 805. Defendant Som pled guilty pursuant to a plea agreement to two counts of Bank robbery in violation of 18 U.S.C. § 2113(a)td) and one count of Using or Carrying, or Aiding

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[3] The Sentencing Commission has dealt with this possibility in § 5G1.1(a) which *provides*: § 5G1.1 Sentencing on a Single Count of Conviction, (a) where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

and Abetting the Use or Carrying, of Firearms During a Crime of Violence. *See id.* at 804. In the plea agreement, Som admitted that the "dangerous weapon" used in the New York robbery was a "short barreled rifle" and that during the commission of the Florida robbery, one of the assailants discharged a firearm. *Tran*, 234 F.3d at 804. Defendant Som's sentence included a seven level adjustment for discharge of a firearm. *See id.*

The Government in *Tran* conceded that the "indictments [there were] defective in that they [were] missing an essential element of the 'separate, aggravated crime' for which Som and Tran were sentenced." *Id.* at 805. The Court there held that "the district court does not have jurisdiction to try, convict, or sentence a defendant, for any offense other than the one charged in the indictment" and based on this traditional, non-startling proposition of law, vacated and remanded the defendants' sentences for resentencing based on their convictions for "the simple firearms offense," i.e. a gun not sawed off. *Tran*, 234 F.3d at 809.

The facts of *Tran* are readily distinguishable from those of the instant case. Unlike the defendants' sentences in *Tran*, Petitioner's-sentence was based only on the crime for which he was convicted, and adjusted as specifically required by the Sentencing Guidelines based only on consideration of relevant offense behavior. Mr. Young in his own trial testimony conceded the truth of all the underlying facts. In stark contrast to petitioner's sentence is defendant Som's sentence in *Tran* which was adjusted based on the discharge of a sawed off firearm for which Som vas not charged, indicted or convicted and to which Som did not plead guilty. Likewise, defendant Tran's sentence included a ten-year sentence for the 924(c) count based on a finding that Tran knew about the use of a *short barreled* rifle during the commission of the crime. Tran, however, "never admitted that he carried or used a *short-barreled* rifle, or aided and

abated the carrying or use of a *short-barreled rifle.* His plea allocution "indicate[d] that he admitted only that he carried a simple firearm." *Tran*, 234 F.3 d at 803.

The case law and the Sentencing Guidelines themselves make clear that a sentencing judge may consider the totality of the facts and circumstances, or the total offense behavior in fashioning sentence adjustments, as long as the enhanced sentence does not result in a sentence in excess of the statutory maximum for the relevant crime. *See i.e. Apprendi*, 530 U.S. at 490, *Garcia*, 240 F.3d at 184. This is what Courts did long before the Sentencing Guideline; were even thought of. In this case, Petitioner was convicted of kidnaping and the following facts, among other things, comprise the totality of the circumstances of Petitioner's commission of that crime: (i) Petitioner's use and carrying of a firearm during the commission of the kidnaping; (ii) Petitioner's attempt to obstruct Justice by getting his tenant to lie about his whereabouts, by his threat to Mr. Turnipseed; and his lies to the FBI and others; and (iii) his use of "special skills" gained in police work to execute a realistic sham arrest. As discussed above, each of these facts was shown by unrefuted evidence or conceded by Petitioner at trial. That any of these acts might have been indicted as a separate federal or state crime is a possibility as obvious as it is irrelevant, and was never considered to impede the operation of Chapter Three of the Sentencing guidelines. Nothing in *Apprendi* supports a conclusion that the Supreme Court intended such a major change in Guideline Sentencing as Petitioner suggests. Despite Petitioner's contentions to the contrary, he was not sentenced for a gun count for which he was acquitted. Petitioner concedes in his own testimony that he did use a different firearm, an automatic pistol not mentioned in Count Two, to facilitate the kidnaping. The fact that the firearm used by Petitioner in his commission of the crime was not the firearm that was the subject of Count Two of the Indictment does not preclude the sentencing judge from considering

Petitioner's conceded use of another firearm.[4] To hold that such a serious surrounding circumstance as the use of a firearm in the commission of a crime cannot be considered by a sentencing judge for enhancement purposes would be contrary both to the letter and the spirit of the Sentencing Guidelines, and is not required by *Apprendi* or the Constitution. Petitioner's position is contrary to both the case law and the Sentencing Guidelines which hold that the possession of a dangerous weapon during the commission of a kidnaping, obstruction of justice and the use of "special skills" in the commission of an offense are all to be considered by the sentencing judge as "adjustment" factors under Chapter Three of the Guidelines in imposing sentence, so long as the net sentence imposed does not exceed the statutory maximum.. *See* U.S.S.G. § 3C1.1 (1998); U.S.S.G. § 2A4.1(b)(3) (1998); U.S.S.G. § 3B1.3 (1998). That an adjustment factor may constitute: conduct which could be prosecuted in federal or state court as a separate crime seems beside the point.

Conclusion

The Petition is dismissed for want of merit.

SO ORDERED.

Dated: White Plains, New York
July 20, 2001

CHARLES L. BRIEANT
Charles L. Brieant, USDJ

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[4] While not relevant to this case, there is ample authority that the facts underlying acquitted counts can be used for adjusting the Guideline computation for a count of conviction, if the acquitted count is part of the offense behavior in the count of conviction. *See United States v. Rodriguez-Gonzalez*, 899 F.2d 177, 181-182 (2d Cir. 1990).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed May 25, 2000]

No. 99-1718

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM E. YOUNG, SR,
Defendant-Appellant,

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25 day of May, two thousand.

PRESENT:

HON. JAMES L. OAKES,
HON. ROGER J. MINER,
HON. SONIA SOTOMAYOR,

Circuit Judges.

UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*), it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Defendant-appellant William E. Young, Sr. appeals from the November 18, 1999 judgment of conviction of the United States District Court for the Southern District of New York (Brieant, J.) sentencing Young to 120 months' imprisonment,

plus three years' supervised release and a $100 fine, for kidnaping in violation of 18 U.S.C. § 1201(a)(1) (1994). On appeal, Young contends that the district court committed reversible error by: (1) excluding the testimony of his two expert witnesses regarding his mental condition; and (2) permitting a constructive amendment of the indictment. In addition, Young claims the district court committed several errors with respect to his sentencing. For the reasons that follow, we reject Young's claims and affirm the judgment of the district court.

BACKGROUND

In the winter of 1998, Young, a retired police officer, made a deal by telephone with Henry Hall to buy for resale 18,000 dozen T-shirts. Young paid Hall approximately $2,100 for shipping costs, but Hall never delivered the goods.

Angry at having been cheated, Young began to gather information about Hall from various sources, including Young's contacts at law enforcement agencies. Young learned that Hall had a criminal history and that Hall was living in Florida. Young also located Cynthia Jarnagin, Hall's girlfriend who lived in Florida.

Young had several telephone conversations with Jarnagin. At one point, Jarnagin told Young that Hall had sodomized her two-year-old boy, but later retracted the story. During one conversation, Jarnagin told Young that she and Hall would be coming to the New York area on May 24, 1998, and would stay at the Hampton Inn in Elmsford, New York. Young told Jarnagin that he would. "arrest"-Hall at the Hampton Inn when they arrived. At Young's request, Jarnagin sent Young pictures of Hall and herself in advance so that Young would know what they looked like.

On May 22, 1998, two days prior to the kidnaping, Young went drinking. Young testified that he had about 20 drinks that night and was severely intoxicated. Young left the bar,

made it home, and collapsed in his front yard. He was revived by paramedics and taken to the hospital. Young, who suffers from diabetes and contends that he ordinarily monitors his consumption of alcohol closely, claims that, after this episode, he was "very weak, sick, dizzy" and "disoriented," and that he did not eat at all on May 23. He also claims that his feeling of disorientation continued until May 27, three days after the alleged kidnaping.

On May 24, 1998, Young enlisted the help of Warren Turnipseed to go to the Hampton Inn. Turnipseed worked at the Newark, New Jersey warehouse that Young used for his business. A few days prior to May 24, Young had told Turnipseed that he would need his help on May 24 to "unload [a] trailer." On the morning of May 24, Young and Turnipseed arranged to meet at the warehouse around 10:00 am, and, at that time, Young "told Warren [Turnipseed] about the situation, that the same guy who was supposed to sell [him] the T-shirts [had] sexually assaulted a two-and-a-half year old kid, and the mother was begging for help." Young told Turnips that he wanted "to scare" Hall, and agreed to give Turnips $200 in exchange for his help.

Prior to meeting with Turnips, Young had packed police hats, police badges, and a pair of guns. After meeting at the warehouse, Young and Turnips proceeded to the Hampton Inn. Sometime after Young and Turnipseed arrived at the Hampton Inn, Hall and Jarnagin exited, at which-point Young and Turnipseed told Hall that he was under arrest, handcuffed him, and placed him in the back seat of Young's car.

Young and Turnipseed drove with Hall from the Hampton Inn in New York to the warehouse in Newark, New Jersey, crossing state lines in the process. Once at the warehouse, Young wrapped duct tape around Hall from head to foot and tied him to a forklift, leaving only Hall's nose uncovered so that he could breathe. Young and Turnipseed then left the warehouse. According to Young, he returned to the

warehouse alone within an hour. In the meantime, Hall had managed to shout for help and had been discovered by the police. When Young saw that the police were there, he fled.

On June 1 Young was arrested. Following a five-day jury trial, he was convicted of kidnaping in violation of 18 U.S.C. § 1201(a)(l).

DISCUSSION

I. *Exclusion of Defendant's Expert Testimony*

Young contends that the district court erred by excluding (1) the expert psychiatric testimony of Dr. Lynn Alison Bornfriend and (2) the expert psychological testimony of Dr. Philip Bonifacio. We review the district court's decision to exclude expert testimony for abuse of discretion, and we will not reverse that decision unless it is manifestly erroneous. *See General Elec. Co. v. Joiner*, 522 U.S.136,141-42 (1997).

In a pre-trial submission filed June 3,1999, Young gave notice pursuant to Fed. R. Crim. P.12.2 of his intention to introduce at trial expert testimony regarding his mental condition (the "12.2 Notice"). Young's 12.2 Notice limited the purpose of Dr. Bornfriend's testimony as follows:

> Dr. Bomfriend's testimony will assist the jury in enabling them to evaluate whether or not William Young acted "willfully" or purposefully when he transported Henry Hall from White Plains, New York to New Jersey. The testimony will also assist the jury in determining whether the government has proved what it has alleged in the indictment that the benefit the defendant sought was "to scare and intimidate and so to coerce [Henry Hall] to fulfill certain business obligations."

With respect to Dr. Bonifacio's expert testimony, the 12.2 Notice stated:

> Dr. Bonifacio, based on his examination of the defendant and his experience and training as a psychologist working with police officers, will testify that defendant's personality and character are consistent with a "police personality," and that he is, therefore, more likely to have been motivated by his desire to rescue Cynthia Jarnigan [sic] and her child than would the average civilian. This will assist the jury in evaluating the government's allegation that Young's purpose was scaring the victim to "fulfill certain business obligations." *See* Admiss Mem., p. 9 ("In order to demonstrate that he did not act for the purpose charged, defendant proposes to present the testimony of Dr. Philip Bonifacio.")

Young's 12.2 Notice did not state that Young intended to make a defense of insanity or a defense of diminished capacity.

Willful transportation of a kidnap victim across state lines is not an element of a § 1201(a)(1) offense. *See United States v. Welch*, 10 F.3d 573, 574 (8th Cir.1993) (joining three other Circuits that "have confronted [the] contention that a conviction under § 1201(a)(1) requires knowing transportation of the victim across state lines" and that have rejected that contention). Moreover, the government is not required to prove any specific motive or purpose for a § 1201(a)(1) kidnaping. *See United States v. Atchison*, 524 F.2d 367, 370 (7th Cir.1975) ("The Supreme Court's decisions have consistently been read to permit a prosecution for kidnaping regardless of the defendant's purpose.") (citing cases). Accordingly, we find that the district court did not abuse its discretion in excluding Young's expert testimony-which,

according to the 12.2 Notice, would have addressed only the issues of willful transportation and motive-because such testimony is not relevant.

In addition, we find the district court did not abuse its discretion in excluding the expert testimony insofar as it was offered to show that Young did not act "willfully" with respect to any of his other actions in furtherance of the kidnaping. As an initial matter, Young recast the expert testimony in this manner, which diverged from the analysis presented in the 12.2 Notice, on the morning trial began. The expert testimony thus could have been excluded for failing to comply with Rule 12.2. Cf. Fed. R. Crim. P. 12.2(d) ("If there is a failure to give notice when required by [this Rule] . . ., the court may exclude the testimony . . . ."). In any event, both (1) the modification of Dr. Bornfriend's conclusion that Young suffered from a "disassociative lack of self awareness of what he [wa]s doing" to encompass *all* of Young's actions and (2) the attempt to extend Dr. Bonifacio's conclusion that Young had an "identifiable police personality" to explain that "[Young's] ability as to the issue of whether or not he acted willfully" was affected in *all* respects were "opinion[s] or inference[s] as to whether the defendant did or did not have the [requisite] mental state," excludable under Fed. R. Evid. 704(b).[1] Accordingly, the district court did not abuse its discretion by excluding the expert testimony on this basis. *See United States v. DiDomenico*, 985 F.2d 1 (2d Cir.1993).

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[1] Rule 704(b) provides, in relevant part:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state . . . constituting an element of the crime charged . . . . Such ultimate issues are for the trier of fact alone.

Fed. R. Evid. 704(b).

Furthermore, Young testified that beginning the day before the kidnaping, he became "sick, dizzy, and disoriented" because of his May 22 drinking binge and diabetes-related high blood sugar levels. He also testified that he was "not really thinking clearly" as he packed the police hats, badges and guns in preparation for the kidnaping. Young further testified that, while in the process of abducting Hall, "a million thoughts were going through [his] head," that he "was confused," that he "was just basically on remote control, automatic pilot," and that he "didn't know what to do." Because such lay testimony regarding Young's mental condition was presented to the jury, it was not an abuse of discretion for the district court to exclude expert testimony that merely "attached a clinical label" to his condition. *DiDomenico,* 985 F.2d at 1163-64 (holding that the district court properly excluded expert testimony regarding defendant's alleged "dependent personality disorder," where lay testimony "covered virtually the entire ground" of the expert testimony); *see also United States v. McBride*, 786 F.2d 45, 50 (2d Cir. 1986) (noting that "a district court may exclude psychiatric testimony which merely offers an opinion about the defendant's capacity to form the mental state required to commit the offense charged, without suggesting the presence of a mental disease or defect") (citing *United States v. Bright*, 517 F.2d 584, 586 (2d Cir.1975)).

Finally, the district court also permissibly excluded Young's proffered expert testimony under Fed. R. Evid. 403. The probative value of that testimony, if any, was substantially outweighed by the potential prejudice of focusing the jury's attention on allegations that Hall sodomized a two-year-old boy, which is what the expert testimony would have done in order to show that Young's mental state was affected by his desire to punish Hall and protect the boy.

For each of the foregoing reasons, we find that the district court did not abuse its discretion in excluding Young's expert testimony.[2]

II. *Constructive Amendment of Indictment*

Young contends that, in their remarks to the jury, the government and the district court constructively amended the indictment, an error that would require us to vacate the judgment and remand for a new trial, *see United States v. Wozniak, 126* F.3d 105,111 (2d Cir. 1997). Specifically, Young points out that the indictment charges only two reasons for the kidnaping: "[T]o scare and intimidate [the victim] and to coerce that person to *fulfill* certain business obligations with . . . the defendant." In its closing argument, however, the government told the jury that the second element of the kidnaping offense (that the victim was kidnaped "for ransom, reward or otherwise") would be satisfied if the jury found Young kidnaped the victim "to scare him, to teach him a lesson" or for "[a]ny and all of those reasons, even if it were to punish him for being a sexual predator." In its instructions to the jury, the district court similarly stated that the second element of the kidnaping charge could be satisfied by any number of reasons: "In order to satisfy this element, the Government need not prove that the reason that Mr. Young kidnaped Henry Hall, if he did so,

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[2] We also reject Young's contention that the district court did not properly carry out its "gatekeeping" duty under *Daubers v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596-97 (1993). Young claims the district court erred by failing to apply the *Daubers* factors to evaluate the *reliability* of his experts' testimony, *see id. at 593-94.* However, the district court did not need to engage in such an inquiry regarding reliability, because, as discussed above, the district court found that the proffered testimony was not *relevant* under *Daubers. See id.* at 592 (holding that, in addition to reliability, Fed. R. Evid. 702 "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility").

was for ransom, reward or pecuniary gain. It is sufficient if he so deliberately and for *any* other purpose not authorized by law . . . ." (Emphasis added.) Thus, because the jury was permitted to conclude that the government had proven the second element of the offense even if the jury found that Young's reason for kidnaping Hall was not one of the reasons specified in the indictment, Young argues that the indictment was impermissibly amended.

"An indictment is constructively amended when the proof at trial broadens the basis of conviction beyond that charged in the indictment" and is *a "per se* violation of the grand jury clause of the Fifth Amendment." *United States v. Patino,* 962 F.2d 263, 265-66 (2d Cir. 1992). However, "an impermissible alteration of the charge must affect an essential element of the offense, and we have consistently permitted significant flexibility in proof, provided that the defendant was given notice of the core of criminality to be proven at trial." *Id.* at 266 (citations and internal quotation marks omitted).

Here, the indictment, the evidence adduced at trial, and the jury instructions all concerned the same "core of criminality," *i.e.*, the May 24 kidnaping of Henry Hall from Elmsford, New York. Although the indictment, on the one hand, and the government's remarks and the jury instructions, on the other hand, may have differed as to Young's motive for the kidnaping, as discussed *supra,* any proven motive is sufficient under § 1201(a)(1), *see Atchison,* 524 F.2d at 370.[3]

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[3] The fact that proof of a particular motive is not an element of the kidnaping offense does not necessarily foreclose a finding of constructive amendment. In *Wozniak,* we found a constructive amendment of the indictment where the government's proof of certain controlled substance offenses relied on marijuana transactions instead of the cocaine and methamphetamine transactions alleged in the indictment, even though proof of a particular controlled substance is not a material element of the offense. *See* 126 F .3d at 109-11. However, the cocaine and methamphetamine transactions alleged in the indictment in *Wozniak* were "separate and distinct" from the marijuana transactions proved at trial, *id.*

Accordingly, because the indictment provided Young with sufficient notice of the core of criminality to be proven at triad and because any variance from the motives listed in the indictment did not "affect an essential element of the offense," we find that there was no constructive amendment of the indictment.[4] *See United States v. Heimann, 705* F.2d 662, 666 (2d Cir.1983) (holding that indictment was not constructively amended where the participants, victims, subject matter and nature of the "fraudulent scheme that was proved were the same as those in the one alleged" and the only variance from the indictment was with respect to the time period when the fraudulent scheme commenced); *see also Patino,* 962 F.2d at 266 (finding no constructive amendment where government's summation referring to "three additional guns" did not "materially alter" charge in the indictment for use of a firearm); *United States v. Knuckles,* 581 F.2d 305, 311 (2d Cir.1978) ("[T]he [o]nly variance alleged by [defendants] is the exact nature of the substance involved, heroin or cocaine; the time, place, people and object proved at trial are in all respects those alleged in . . . the indictment.").

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at 111, and, accordingly, the *Wozniak court* found that the indictment had been constructively amended under the "specific circumstances in [that] case," *id.* at 109. By contrast, the indictment and proof at trial here involved the same event constituting the offense.

[4] We note the irony of Young's complaint that his testimony about his desire to protect Jarnagin and her son was used against him. Such testimony, which was offered to explain that Young did not kidnap Hall for the reasons specified in the indictment, backfired because Young misunderstood that, under the law, any proffered reason could support a kidnaping conviction. *Cf. United States v. Knuckles*, 581 F.2d 305, 311 (2d Cir.1978) (noting that defense counsel elicited cocaine evidence in support of drug conviction while cross-examining government witness about whether heroin charged in indictment was involved).

III. *Sentencing*

Having evaluated Young's challenges to the district court's imposition of sentence, we find each of them to be without merit. In so doing, we accept the district court's findings of fact unless they are clearly erroneous and give due deference to the district court's application of the United States Sentencing Guidelines (1998) ("U.S.S.G.") to the facts. *See United States v. Franklyn*, 157 F.3d 90, 97 (2d Cir.1998), *cert. denied*, 525 U.S. 1 12 (1999).

The district court imposed a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1 .1 because, *inter alia,* Young induced his tenant, Ethel Belcher, to lie to law enforcement authorities regarding his whereabouts on the day of the kidnaping. Young concedes that he asked his tenant to tell "anybody who asks" that he was home that day. Such conduct, standing alone, is sufficient to support the enhancement. *See* U.S.S.G. § 3C1.1, comment. (n.4(a)).

The district court also imposed a two-level enhancement under U.S.S.G. § 3B1 .3 because Young used the special skills he had obtained during his thirty-one years as a police officer to commit the offense. The record supports the district court's finding that Young used standard police investigative techniques and facilities to track down Hall. Moreover, the record supports the district court's finding that Young used a police hat, police badge, and police procedures and techniques to affect a realistic "arrest" of Hail. Accordingly, we uphold the district court's enhancement based on its finding that Young used special skills to facilitate the commission of the offense.

Despite Young's contention that he intended to release Hall within hours of leaving Hall at the warehouse, the district court declined to decrease Young's base offense level under U.S.S.G. § 2A4.1(b)(4)(C). The district court first found that "Young could not have intended to release Mr. Hall" and then

noted that Hall had not been released in any event. We find no reason to reverse the district court's decision not to apply § 2A4.1(b)(4)(C), which explicitly requires that "the victim was released" in order to qualify for an offense-level reduction.

Finally, we reject Young's challenge to the district court's decision to deny credit for acceptance of responsibility under U.S.S.G. § 3E1.1. The district court found that Young, *inter alia,* perjured himself at trial primarily for the purpose of showing that he was not mentally responsible for the crime committed. We thus defer to the district court's finding that Young did not accept responsibility for his actions.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

DISTRICT COURT SENTENCE JUDGMENT (EXCERPT), NOVEMBER 18, 1999

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 120 months.

DISTRICT COURT SENTENCE HEARING (EXCERPTS), NOVEMBER 18, 1999

* * * *

[BRIEANT, DJ] . . .

The objections to the presentence report assume the total truth of the trial testimony of Mr. Young. I would like to say at the outset that I do not accept as true a great deal of his testimony where it is not corroborated by other evidence in the case, and where on its face it is essentially self-serving and implausible.

The government, in its letter memorandum dated November 16th, has highlighted a few of the circumstances in which the testimony of the defendant is contradicted by other evidence in the case, and the Court adopts the argument set forth therein.

The Court also notes that I disagree with the testimony which was apparently conceived of early in the case when apparently everybody, including possibly even the government attorney and the Court, thought that there had to be an intentional plan to cross the state line, and he got all the way from Elmsford to Newark without knowing where he was going. I think that is just made up our of whole cloth.

The first issue is whether there should be an enhancement of two levels under Section 3C1.1 of the guidelines for obstruction.

The Court concludes that this enhancement is appropriate on all the credible testimony and evidence in the case. The evidence is clear that the defendant induced his tenant, Ethel Belcher, to lie to law enforcement authorities regarding his whereabouts on the day of the kidnapping. He also lied to Cynthia Jarnagin on the telephone after the crime, because he realized, as was obvious to a trained law enforcement officer such as Mr. Young, that the telephone calls were part of an

official investigation. He lied initially to the FBI when they interviewed him and said that he had been home during the day of the kidnapping. Mr. Young also threatened Mr. Turnipseed in order to ensure his silence.

The Court believes that these uncontroverted facts, at least clearly established facts, justify an adjustment contemplated by Section 3C1.1.

The defendant argues at Pages 3 and 4: of his objections to the presentence report, and here again today in his oral presentation, that there was a short time period following the lie to the FBI agents, said to be about an hour—and I will assume that that is correct, although I have not checked the record as to the time lapse—Mr. Young repented and decided to tell the truth, at least in part. The defendant argues that the agents of the FBI did not rely on the falsehood that the upstairs tenant told them, and that Mr. Young recanted his lies fairly promptly.

The Court rejects as inapplicable the contention that the obstruction of justice was not significant or that it did not last long enough to justify the enhancement. The Court is convinced on all the evidence that he acted willfully and deliberately in lying to the FBI agents and inducing Ms. Belcher to lie, as well as threatening Mr. Turnipseed to get him to remain silent. The defendant knew the minute he returned to the scene of the warehouse that the police and lay enforcement agencies were involved in the case, and that there was an investigation ongoing.

The Court also concludes that Mr. Young in his trial testimony exaggerated significantly the nature and condition of his health at the time of the crime. I do not accept as true his contentions as to the amount of alcoholic beverage he consumed two nights before The defendant also argues that his attempt to deceive the investigating officials was "a product of a level of denial which was induced by psychological and

psychiatric factors, rather than an intent to obstruct justice."

The Court simply rejects as illogical, unfounded and unsupported by the facts the expert testimony and arguments offered in support of that conclusion. It is simply not credible, and not entitled to any weight.

Dr. Bornfriend assumes that he was in a weakened condition when he effected the kidnapping. I do not believe that that was substantially true, and I do not believe there is any credible evidence in this case which would support a conclusion that he was so disassociated from reality that he denied his misconduct "in a primitive attempt to avoid an unacceptable truth," using Dr. Bornfriend's words.

Mr. Young's entire course of conduct in dealing with Henry Hall was thoughtful, premeditated, over a lengthy period of time, and continuous. He applied his skills as a law enforcement official to bring Henry Hall to justice, and to get some kind of personal revenge against Hall for having defrauded him of approximately $2, 000, one half of which he had already recovered from a business colleague. In his comments to Mr. Hall and, of course, going to New Jersey and during the kidnapping, he referred to himself in the third person, because he knew that Mr. Hall was not personally acquainted with him, and expressed that motivation in his comments to Mr. Hall as appears in the trial record.

The Court concludes, for all the foregoing reasons, that the objection to the computation by the Probation Department is overruled.

* * * *

Also, the Court draws no inference as to the acquittal on the second count. Mr. Young testified that he had a different firearm than the specific identified firearm which was charged in the indictment. The indictment probably did not have to identify which of the two guns was being used in the

crime that was carried by Mr. Young by model or serial number or the maker. It was clear from his own testimony and the testimony of Mr. Turnipseed that two guns were used in the crime, both guns belonged to Mr. Young, Mr. Young carried one of them and gave the other one to Turnipseed to carry. Turnipseed had served in the Army, and he knew the difference between a revolver and a pistol.

However, a jury as this one was, motivated perhaps by a desire to be cautious and fair, chose to disbelieve Turnipseed on this issue and to believe that Mr. Young was carrying a different gun than the gun charged in the indictment, and that Mr. Turnipseed was carrying the gun which was described in Count Two and which was furnished to him by Mr. Young.

* * * *

The defendant also objects to the. proposed enhancement submitted by the Probation Officer for abuse of trust and use of special skills.

It was very clear at the trial that Mr. Young used the skills he had obtained in 31 years of service as a police officer, and that he used standard police investigative techniques and facilities, which are not known or available to every criminal, in order to track down Hall. Indeed, it was his use of police investigative skills that brought him to Jarnagin in the first place.

He carried an active-duty police badge and wore a police hat during the kidnapping, and he used his status as a retired police officer to obtain information, which was not otherwise public, from two separate New Jersey police departments. He determined the victim's background and whereabouts under most difficult circumstances, which would have frustrated many less skilled detectives, and he used his skills to find and involve Jarnagin in the course of his singleminded pursuit of Hall over the dispute which they had concerning the T-shirts.

The Court agrees with the defendant that the Application Note 2, Section 3B1.3, is not effective as to this particular crime. However, here, Mr. Young had a police hat and police badge and because of his experience in making many prior arrests, he gave every impression of being an experienced police officer effecting a lawful arrest. The victim, Hall, who had been arrested many times before in his life, reasonably believed that Mr. Young was engaging in exercising the office of a police officer and making a lawful arrest and therefore, he did not run away or resist the arrest. Those facts alone are significant enough to support a finding that he used special skills and learning and experience obtained as a police officer.

These talents, experience and information acquired in the law enforcement profession significantly facilitated the commission of the crime and its concealment. Such skills in a police officer are not possessed by members of the general public, but are the result of a lot of hard work and education and training over a lengthy period of time.

Accordingly, the evidence and the facts justify the enhancement on that ground.

In conclusion, the Court adopts the following guideline findings which are essentially consistent with the presentence report, namely, that the base offense level is 24, two levels are added for use of a firearm, two levels are added under 381.23 for the use of special investigative law enforcement skills, two levels are added under Section 3C1.1 for the attempts to obstruct the investigation. That makes a total offense level of 30.

* * * *

To serve those purposes of sentencing, the Court now sentences the defendant to the custody of the Bureau of Prisons for a term of 120 months on Count One, and he is fined $15,000.

* * * *

APPENDIX B

CONSTITUTIONAL, STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . .

18 U.S.C. § 1201. Kidnapping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when—

> (1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary if the person was alive when the transportation began; . . .

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment. . . .

18 U.S.C. § 1512. Tampering with a witness, victim, or an informant

. . .

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

> (1) influence, delay, or prevent the testimony of any person in an official proceeding; . . .
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

> (1) attending or testifying in an official proceeding;
>
> (2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings:
>
> . . .

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both. . . .

18 U.S.C. § 924(c)(1)(A) [firearms use]

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 913. Impersonator making arrest or search

Whoever falsely represents himself to be an officer, agent, or employee of the United States, and in such assumed character arrests or detains any person or in any manner searches the person, buildings, or other property of any person, shall be fined under this title or imprisoned not more than three years, or both.

USSG § 2A4.1 Kidnapping, Abduction, Unlawful Restraint

(a) Base Offense Level: 24

(b) Specific Offense Characteristics

. . .

(3) If a dangerous weapon was used, increase by 2 levels. . . .

USSG § 3C1.1 Obstructing or Impeding the Administration of Justice

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

USSG § 3B1.3. Abuse of Position of Trust or Use of Special Skill

If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under § 3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under § 3B1.1 (Aggravating Role).